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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 304

FRANK CAMPBELL LITTLETON, FARMER-DEBTOR, *Petitioner,*

v.

THOMAS N. DELASHMUTT, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

On June 18, 1941, the debtor (Petitioner) filed his petition under the Frazier-Lemke Act in the United States District Court for the Eastern District of Virginia*. There-

* References to the various papers, orders and decrees not in the printed record but mentioned in this Statement of the Case will be found in the Docket Entries, U. S. District Court, beginning at page 4 of the printed record.

after an order was entered on December 19, 1941, declaring him to be a bankrupt within the meaning of the Frazier-Lemke Act.

On April 14, 1942, the Conciliation Commissioner set aside the debtor's property and directed him to pay an annual rental of $7,600.00. Although the debtor enjoyed all of the benefits of a stay from April 14, 1942, upon the debtor's own petition in which he alleged that the three year moratorium period to which he was entitled should run from January 19, 1944, the District Court on November 29, 1945, directed that the three year period run from January 19, 1944 to January 19, 1947, (R. 27).

On August 25, 1947, an order was entered appointing trustees to sell the real estate (Part of the order is found at R. 28, and the order in full is printed at R. 46).

On September 4, 1947, the debtor filed a motion to review, reconsider and rescind the order of sale. This motion was overruled by an order entered in the District Court on September 23, 1947. Thereupon, the debtor appealed to the Court of Appeals.

On June 7, 1948, the Court of Appeals affirmed the order of sale entered in the District Court (*Littleton* v. *Rust,* 166 Fed. 2d 1007, Case No. 5693). Certiorari was denied by this Court (*Littleton* v. *Rust,* 334 U. S. 833).

On June 22, 1948, the debtor filed his petition in the District Court asking that the trustees be directed to postpone the sale of the real estate and other properties. On July 1, 1948, the District Court directed the trustees to proceed to execute the order of sale entered on August 25, 1947.

The sale was finally held on September 2, 1948, pursuant to the order of August 25, 1947. At the sale the Respondent was the highest bidder and the property was knocked down to him for $220,000.00. This was considerably in excess of the appraised value. The debtor did not exercise his right to redeem the property within ninety days after the date of the sale and, in fact, filed in the District Court

on December 8, 1948, in proper person and by counsel, a stipulation dated November 26, 1948, withdrawing all objections to matters relating in any way to the sale and requested that the property be conveyed to the Respondent (R. 51). On December 2, 1948, the trustees pursuant to the decree of the Court, conveyed the property to the Respondent. The acts of the trustees were approved and they were discharged by order entered on December 16, 1948.

Thereafter, there were a number of hearings in connection with the distribution of the proceeds of sale in which hearings the debtor actively participated without questioning the validity of the sale. These culminated in the second appeal (*Littleton* v. *Kincaid,* 179 F. 2d 848) to the Court of Appeals which issued its mandate on January 12, 1950, in connection with the distribution of the proceeds of sale. Certiorari was denied (*Littleton* v. *McNeil,* 340 U. S. 809).

In the meantime the respondent filed a motion requesting the District Court to require the debtor to remove his personal property from the real estate purchased by the respondent. After a hearing on April 27, 1949, the debtor consented to the entry of an order on May 9, 1949, in which it was adjudged that respondent was entitled to the full possession of the real estate and which directed and authorized the removal of debtor's personal property therefrom (R. 52).

From May 9, 1949, until March 14, 1950, no question was raised involving the rights of the respondent as purchaser of the real estate and, in fact, no question was raised as to the respondent's title to the real estate from December 2, 1948, the date of the Trustees' deed to respondent, until March 14, 1950.

On March 14, 1950, after all the foregoing, the debtor filed an application in the District Court to have the sale of the real estate to the respondent vacated (R. 29). The respondent filed in the District Court a motion to dismiss the application (R. 31) and on April 18, 1950, the debtor

filed an answer to the motion of the respondent (R. 33). The District Court advised the parties that it considered that all of the matters raised by the application had been passed upon and that there was no need for a hearing. However, the debtor was given an opportunity to file and filed on October 14, 1950, a brief in support of his application and also filed on October 16, 1950, numerous affidavits and exhibits relating to the application. On October 25, 1950, the Judge of the District Court advised counsel that having considered the application, brief and the actions of the courts, he did not deem any further hearing necessary and on November 8, 1950, entered an order denying the application (R. 39). In the meantime the debtor had filed on October 27, 1950, an affidavit of bias and prejudice based upon the Court's actions in this proceeding and requested that the Judge of the District Court disqualify himself (R. 36). The order of November 8, 1950, also denied the request that the Judge of the District Court so disqualify himself (R. 39).

On November 21, 1950, the debtor filed a motion for an order directing immediate disbursement of funds arising from the sale to respondent and such an order was entered on November 27, 1950 (R. 42).

On November 16, 1950, the debtor filed a motion for a hearing upon the application (R. 40) and this motion was denied by an order entered December 4, 1950 (R. 44).

The action of the District Court was affirmed by the Court of Appeals (*Littleton* v. *DeLashmutt,* 188 F. 2d 973).

This statement of the case has been more detailed than would be desirable except that it is felt to be proper in the statement to show that the debtor has been given every opportunity to protect his interests in every stage in the proceeding.

SUMMARY OF ARGUMENT.

The District Court and the Court of Appeals properly held that the application sought a re-examination or rehearing on questions already determined in the case; that the record disclosed the application was inconsistent with the debtor's conduct in the case, was frivolous and without merit; that the application was not seasonable and sought to disturb rights vested in reliance on former orders; that the District Court properly exercised its discretion in refusing to entertain the application; and that the affidavit of bias and prejudice was based upon adverse rulings in the cause and was properly held insufficient.

ARGUMENT.

The Petitioner asserts that none of the reasons given by the District Court for dismissing the application is tenable. He states such reasons to be (1) that the application related to issues theretofore determined by that Court and by the United States Court of Appeals; (2) that certiorari had been denied by the Supreme Court; (3) that the application was without merit and (4) that there was nothing before that Court in connection with the proceeding, the proceeding having been finally terminated. (This last does not appear in the court order but in a prior letter to counsel.) Although the Petitioner presents and attacks the four stated reasons separately they should be considered as a whole.

The Application Sought a Rehearing on Questions Already Determined in the Case.

An examination of the nine grounds stated in the application and of the record shows quite clearly that the District Court's reasons were justified and the Court acted properly in dismissing the application. For the same reasons the United States Court of Appeals properly affirmed the District Court. The nine grounds listed in the application

and the justification of the action by the District Court follows:

GROUND 1. *"No Stay order pursuant to the mandate of the Statute has ever been entered."* The statute (11 U. S. C. A. § 203 (s) (2)) provides that "when the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years." By an order entered January 19, 1944, (R. 25) the Court directed the stay period to commence on April 14, 1942—the date of the order by the Conciliation Commission. However, the question of the duration of the stay period was directly raised on petition of the debtor filed April 12, 1945 alleging that such period should not commence until the Court's order of January 19, 1944. The Court allowed the stay period exactly as requested by the debtor, namely, to January 19, 1947. (Order of November 29, 1945, R. 27). This effectively and completely foreclosed the petitioner from thereafter questiong the sufficiency of the stay order. This precise point was decided in *Pfister* v. *Northern Illinois Finance Corporation,* 317 U. S. 144 (1942) where the debtor appellant claimed error (p. 146) "because the order of stay approved by the Commissioner under § 75, sub. s(2) [on August 13, 1940], was far less than the statutory period of three years from the entry of the stay order." In affirming, this Court, by Mr. Justice Reed, said: (154)

> "IV. On account of debtor's motion, requesting the running of the moratorium of three years from April 26, 1940, the day of his adjudication in bankruptcy under 75, sub. s, we do not consider the correctness of a stay of less than three years under the other circumstances. In this instance it was correct.
> "Affirmed."

The Petitioner relies upon *Wright* v. *Logan,* 315 U. S. 139, in support of his claim that the proceedings in the

District Court were improper because no legal stay order was granted. In that case no stay order was entered at all. In our case a stay order was entered and the period fixed was that which was requested by the Petitioner. When the decree of sale entered August 25, 1947 (R. 46) was affirmed by the Court of Appeals, it was said (*Littleton* v. *Rust*, 166 F. 2d 1007, at 1008):

> "It appears, furthermore, that bankrupt has had the full three year period for rehabilitation that the statute contemplates and that the order of which he complains directing a sale of his property is an order of the District Judge made after full consideration of the rights of bankrupt and his creditors, and not affected in any way by any action of the Commissioner."

The same statement was reiterated in the opinion of the Court of Appeals in this case. *Littleton* v. *DeLashmutt*, 188 F. 2d 973, 974.

GROUND 2. *"The so-called Trustees, who purported to sell the real estate, were not qualified to act as such and all their actions in purporting to sell said real estate were void."* The trustees were specifically named in the decree of sale of August 25, 1947. At the time the debtor specifically objected to the appointment of trustees and stated such objections in points 11 and 13 in his "Statement of Points to be presented on Appeal." Having appealed once from the decree which directed the trustees to sell the real estate the debtor was not entitled to a rehearing by the District Court on that order. To avoid repetition, grounds 3, 4, 5, 6, 8 & 9 are subject to the same response.

GROUND 3. *"The purported sale of said real estate was not conducted as required by statute and was void."* There is no allegation that the sale did not conform to the decree of August 25, 1947, and no such allegation could be made with propriety. Whether the decree of sale was in strict conformity with the statute or not, it became the law of the case when affirmed.

GROUND 4. *"The purported advertisement of the purported sale of said real estate did not comply with the statutory requirements and was a nullity."* The decree of sale was explicit as to the manner of advertising (paragraph (c) thereof) and there is no allegation that it was not complied with.

GROUND 5. *"The person, namely, John F. Kincaid, who purported to act as Conciliation Commissioner, was not qualified to act as such officer and was not at any time during the proceeding affecting said real estate a Conciliation Commissioner, and his acts relating thereto were void."*. This was the principal point urged in the appeal from the decree of sale and the Court of Appeals squarely ruled adversely to the debtor, *Littleton* v. *Rust,* 166 F. 2d 1007 (1948).

GROUND 6. *"The said Farmer-Debtor, Frank Campbell Littleton, has never had the opportunity to pay off his debts so as to release all liens upon his real estate."* On that point the Court of Appeals said in 1948 (*Littleton* v. *Rust,* 166 F. 2d 1007, 1008):

> "The bankrupt has had every advantage under the law that the statute contemplates and more and has delayed his creditors for more than six years in the enforcement of their rights. The questions raised by his appeal have no merit. The order appealed from will be affirmed."

Even after that decision, the debtor had several months more—until ninety days after the sale, which was held September 2, 1948—to redeem the property.

GROUND 7. *"No auctioneer for the sale of said real estate was ever appointed or confirmed by the Court, and all the acts of the so-called auctioneer, who purported to cry the sale of the said real estate, were void."* Whether the auctioneer was appointed or not, the Court confirmed his acts by directing payment of his fee of $100.00 as recommended in the Trustees' Report of December 16, 1948. The scheme of distribution of all funds from the sale of

"Oak Hill" is final by mandate of the Court of Appeals (Case No. 5962) on which this Court refused certiorari. (*Littleton* v. *McNeil*, 340 U. S. 809)

GROUND 8. *"The requirements imposed upon potential bidders at said purported sale of said real estate were unlawful and impossible of compliance by such individuals as might desire the opportunity to purchase said real estate."* These were specifically prescribed in the decree of sale of August 25, 1947, and were complied with. (R. 47, paragraph c).

GROUND 9. *"In the Order of the Court entered August 25, 1947, for the sale of Oak Hill, the property so advertised was misdescribed, and stated that 1725.1 acres, by survey, were to be sold and said description was taken from a deed of trust dated August 29, 1939, describing property conveyed to David N. Rust, Jr., and W. A. Metzger, trustees, and duly recorded in the Clerk's Office of Loudoun County, Virginia, but there is no survey of record of the said property and so far as the petitioner is advised there never has been a survey of 1725.1 acres; that the description mentioned herein is not a true description of the property; that it is presently impossible to determine exactly what property was sold and conveyed by the so-called Trustees."* This ground, on its face, shows that the description was incorporated in the decree of August 25, 1947, which became the law of the case. In any event the same objection was raised by the debtor's petitions which were subsequently withdrawn by debtor's stipulation of November 26, 1948. (R. 51)

Not one single fact was alleged in the application which was not known to the debtor at the time of the prior adjudications of the District Court and of the Court of Appeals. There was nothing new presented to the District Court and certainly it was within the discretion of the court to deny a rehearing.

The Petitioner complains that the District Court, in denying the application, mentioned the fact that this Court

denied certiorari in the prior appeals and quoted from *State* v. *Baltimore Radio Show,* 338 U. S. 912 at 919 and *Augoston* v. *Commonwealth,* 71 Sup. Ct. 9, to the effect that a denial of certiorari does not indicate an approval of the decision in the court below. The language as used by the District Court carried no such implication but merely indicated the ultimate disposition of the appeals.

The Record Disclosed That the Application was Inconsistent with the Petitioner's Conduct, was Frivolous, and Without Merit.

The actions of the Petitioner from the date of the trustees' deed until the filing of the application, approximately fifteen months later, were entirely inconsistent with the Petitioner's repudiation of the sale as asserted in his application. This inconsistency cannot be excused by a vague reference to any contractual relation between the Petitioner and the Respondent. The Petitioner has nowhere alleged any facts supporting his general assertion that the Respondent was guilty of a breach of contract. Even if such facts had been alleged, the Court of Bankruptcy would have had no jurisdiction over a dispute arising out of the breach of contract. Any contract entered into between the Petitioner and the Respondent was outside of the farmer-debtor proceedings and an action for an alleged breach would necessarily be an independent action. No action of the District Court in this cause was based on such contract.

These inconsistent actions of Petitioner (debtor) were:

(a) On November 26, 1948, the debtor executed, acknowledged and delivered a deed quit-claiming and releasing all his right, title and interest in the "Oak Hill" farm to Thomas N. DeLashmutt (R. 32).

(b) On December 8, 1948, not 1949, as erroneously set forth in the Motion of Thomas N. DeLashmutt to Dismiss, (R. 31), the debtor, in his proper person over his own signature, endorsed by his then counsel, filed a document

herein, dated November 26, 1948 (R. 51) by which he specifically withdrew all motions, petitions and other objections theretofore filed objecting to a sale of Oak Hill and consented to the confirmation of the sale of said property to the Respondent pursuant to the decree of August 25, 1947.

(c) On April 2, 1949, DeLashmutt served notice upon the debtor and conciliation commissioner that he would ask the court to require all the furniture and other personal property to be removed from Oak Hill. As a result, a consent order was agreed upon between counsel for Littleton and DeLashmutt and was entered by the Court on May 9, 1949. (R. 52) This order recited that "said Thomas N. DeLashmutt is now entitled to free possession of the real estate purchased in these proceedings" and directed Littleton to remove his personal property from "Oak Hill" within specified periods. This order provided further that "Nothing contained herein shall be construed to prevent said Thomas N. DeLashmutt from the free use and enjoyment of said property known as 'Oak Hill'." The debtor's second appeal to the Court of Appeals was noted and perfected after the entry of this order, but no question as to the order was raised in either the Notice of Appeal or in the Statement of Points to be relied upon.

(d) The debtor accepted the benefits of the sale and was estopped to question its validity. On his numerous motions the entire proceeds except a balance of approximately $18,000.00 was paid out for his benefit. One month after the money was paid into court, the debtor, on January 7, 1949, filed a petition for a reference in order to make a prompt distribution of the funds, reciting the sale of the real property and the confirmation of the sale. On February 15, 1949, he moved that the first trust notes aggregating $136,788.14 be paid. On April 27, 1949, he filed a motion to withdraw $7,500.00 for his own use, alleging there would be approximately $20,000.00 surplus due him. On July 12, 1950 (after his application to vacate had been filed), he consented to an order directing immediate payment of $18,-

600.00 of the fund to the holder of the second trust. On November 21, 1950, he moved for the immediate disbursement of the entire balance of the funds. On December 21, 1950, an order was entered directing the conciliation commissioner to deliver to the creditors the checks against the fund which had theretofore been issued by the Clerk. The check to the debtor for the balance of the proceeds was held up pending some dispute over the amount of interest due certain creditors and on February 10, 1951, he filed an original mandamus proceeding in the Court of Appeals to compel the District Judge to order the balance paid to him (*Littleton* v. *Hutcheson,* Case No. 6240).

(e) The debtor, for a period of ten months from May 9, 1949, when he consented to the order directing removal of his personal property from "Oak Hill", until he filed his application on March 14, 1950, stood by in continued acquiescence and permitted DeLashmutt to go into possession. In the circumstances the debtor was guilty of laches.

From the record the sale was obviously fair. The debtor had placed a value of $165,050.00 on all his real estate when he filed his petition (R. 19). The court-appointed appraisers in their report of February 20, 1942, placed a valuation of $191,411 on all the land and buildings (R. 23). At the public sale, after the extensive advertising provided for in the decree of sale, DeLashmutt was the highest bidder at $220,000.00. While the application makes no mention of it, the appellant's brief in general terms states that any money paid "in" (presumably into Court) must be refunded to the purchaser. The debtor failed for more than six years during which he had the right to do so to pay into court the appraised value of the real estate and failed to exercise his right of redemption within the 90 day period allowed him after the sale. There is no assurance that he could or would do it if the sale were set aside.

The District Court was not Required to Entertain the Application.

We do not question the assertion of Petitioner that there are no terms in courts of bankruptcy. However, we do say that all of the cases upon the power of a District Court to re-examine orders entered in bankruptcy proceedings make as conditions of such re-examination that it be seasonable and that rights which will be disturbed by such re-examination have not become vested under the order. Furthermore, the granting of such re-examination is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion if entertained, is not the subject of appeal.

Pfister v. *Northern Illinois Finance Co.*, 317 U. S. 144.
Wragg v. *Federal Land Bank*, 317 U. S. 325.
Kimm v. *Cox*, 8 Cir., 130 F. 2d 721.
Curtis v. *O'Leary*, 8 Cir., 131 F. 2d 240.
Walgreen Drug Stores v. *Scruggs Drug Store*, 4 Cir., 129 F. 2d 789.
Standard Steel Works, 9 Cir., 111 F. 2d 1000.
Harris v. *Mills Novelty Co.*, 10 Cir., 106 F. 2d 976.
McLeod v. *Boone*, 9 Cir., 91 F. 2d 71.
Collier, Bankruptcy, 14 ed. § 2.12 (2).

The Petitioner cannot contend that the application was seasonable or that rights had not become vested when more than a year elapsed between the approval of the trustees' conveyance to the Respondent and the filing of the application, during which period the Petitioner consented to the order requiring the removal of his personal property from Oak Hill and participated in proceedings for the distribution of the purchase price paid by the Respondent into the Bankruptcy Court in reliance upon the validity of the decree of sale, approved by the Court of Appeals. Most of this money has been paid out in discharge of the Petitioner's obligations, on his own motions.

Both the District Court and the Court of Appeals characterized the application as seeking "a rehearing or fur-

ther hearing on issues raised in this proceeding" (R. 39, 61.).

There is no absolute "right to a hearing" on an application for a re-examination or rehearing, as contended by the petition, merely because a litigant asks for one, or files a paper in the cause. As said in *Walgreen Drug Stores* v. *Scruggs Drug Store, supra,* at page 790:

> "Undoubtedly the District Court 'has the power, for good reason, to revise its judgments upon reasonable application, and before rights have vested on the faith of its action.' Wayne Gas Company v. Owens-Illinois Company, 300 U. S. 131. However a litigant has no absolute right to a rehearing simply because he asks for one, for as was said in Wayne Gas Company v. Owens-Illinois Company, supra, 300 U. S. at 137: 'The granting of a rehearing is within the Court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal.'"

The necessity for such discretion in the District Court is made evident by the Petitioner's conduct in this case. From the date the decree of sale was affirmed on June 7, 1948, until the sale on September 2, 1948 the Petitioner filed eight separate petitions or motions directed toward arresting the sale. Had the Court been required to have taken testimony or even heard argument of counsel each time a new paper was filed, he could have forestalled the sale indefinitely by appeal from the order on each motion or petition. To require such a hearing on the application as demanded by the Petitioner, regardless of prior action of the Court, would result in endless vexation and harassment to litigants, as well as to the Courts. Public policy and the interest of litigants alike require that there be an end to litigation. See *Baldwin* v. *Iowa State Travelling Men's Asso.,* 283 U. S. 522. And in the absence of prohibitive legislation, Courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks. See *Ex parte Peterson,* 253 U. S.

300, 312. The District Court properly took judicial notice of the proceedings which had already been had in this case, and perceiving the debtor's application to be entirely devoid of merit, entered the order which of necessity would have been entered if a hearing or argument were had, without putting the litigants to the expense and inconvenience of such hearing or argument.

The District Court Properly Held the Affidavit of Bias or Prejudice to be Insufficient.

This point is passed over very quickly in the Petitioner's brief. A mere reading of the affidavit of bias or prejudice (R. 36) discloses not one single allegation of fact that the Judge was biased or prejudiced. The most that can be said is that it alleges that in some particulars the Judge made adverse rulings. The affidavit was not filed until after the Court had indicated its adverse ruling on the application. Such an affidavit is not sufficient to bring into operation 28 U. S. C. A., Section 144. *Ex Parte American Steel Barrel Co.,* 230 U. S. 35, 43; *Berger* v. *United States,* 255 U. S. 22, 31; *Morse* v. *Lewis,* 4 Cir. 54 F. 2d 1027; *Beecher* v. *Federal Land Bank,* 9 Cir. 153 F. 2d 987; *Walker* v. *United States,* 9 Cir. 116 F. 2d 458; *Ryan* v. *United States,* 8 Cir. 99 F. 2d 864; *Craven* v. *United States,* 1 Cir. 22 F. 2d 605.

If the affidavit of bias and prejudice were held to be sufficient, any litigant, upon learning of an adverse ruling, could have the matter in controversy referred to another judge and reopened.

CONCLUSION.

The Debtor had been afforded far more than his "day in court" prior to the filing of the application but, notwithstanding this, the District Court granted the Debtor an opportunity to present his argument in the form of a written brief. The Debtor did not show any merit in his application either before the District Court or in the presen-

tation in the United States Court of Appeals. Clearly the District Court acted properly in denying the application and there was no error in the opinion of the Court of Appeals.

It should be remembered that the only connection of the Respondent with this proceeding is as a bona fide purchaser at a judicial sale, and that his funds were paid into court and disbursed by it for the benefit of the Petitioner and his creditors.

We respectfully submit that the petition for a writ of certiorari should be denied.

James H. Simmonds,
Arlington, Virginia.

Fielding L. Williams,
Richmond, Virginia,
Counsel for Respondent.

October 15, 1951.

FILED
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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 304

JOSEPH J. MATHY, Executor of the Estate of FRANK CAMPBELL LITTLETON,
Farmer-Debtor,
Now Deceased,
Petitioner,

vs.

THOMAS N. DeLASHMUTT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

REPLY BRIEF ON BEHALF OF PETITIONER.
On the Subject of a Right to a Hearing.

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On the Subject of a Right to a Hearing.

The brief of respondent sets up premises which are non-existent and thereupon offhand he cavalierly argues that the petitioner has no case.

If the premises assumed by respondent existed, he would be correct in his conclusions. They do not exist and his conclusions are outside the case.

These statements this reply brief will here demonstrate.

THE ONLY ISSUE RAISED ON APPEAL BELOW AND IN THIS COURT IS THE RIGHT TO A HEARING.

The respondent's brief sidesteps the real, and only, issue, namely, the *right to a hearing* of the questions raised in the pleadings. The questions raised in the pleadings were never heard.

These pleadings were: (1) the Application, (2) the Motion (or Answer) and (3) the Answer (or Reply). These pleadings are found in the Record as follows:

1. The Application, Court of Appeals Record 26a, repaged Record in this Court, R. 29.

2. The Motion (or Answer) of DeLashmutt, Court of Appeals Record 28a, repaged Record in this Court, R. 31.

3. The Answer (or Reply) of the Petitioner, Court of Appeals Record 30a, repaged Record in this Court, R. 33.

Those three pleadings presented two questions to be heard by the District Court *which had never theretofore been presented.* That court refused a hearing of those questions.

The only issue (1) heard in the District Court, (2) raised on appeal in the Court of Appeals, and (3) presented in this Court, is this one:

Should the District Court have heard those questions? That is, was the petitioner *deprived of a hearing?* The District Court never came to grips with the new questions so raised. It never granted a hearing.

The questions which the District Court refused to hear, and which had never theretofore been raised were these:

1. The first question raised in the District Court was this: No stay order was ever issued by the District Court as laid down by the mandate of the statute in U S C, Title 11, Section 203 (s) (2) (Section 75 (s) (2) of the Bankruptcy Act) which requires that "WHEN the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years."

This the Application and the Answer (Reply) of the petitioner alleged the District Court *did not do.* As stated by the respondent himself in his brief at page 2, "the District Court on *November 29, 1945*, directed that the three year period run from *January 19, 1944.*" This fatal defect in that order was alleged in Mr. Littleton's Application (R. 26a in Court of Appeals, R. 29 in this Court) at Paragraph I, (26a) R. 29, and in his Answer (Reply), (30a) R. 33 at Paragraph I, (31a) R. 34.

This being a *retroactive order* which the Court had no power to make, it was void.

Such was the first question raised in the District Court, but never given a hearing.

2. The second question raised, but never heard, in the District Court by the Motion (Answer) of the respondent DeLashmutt and by the Answer (Reply) of the petitioner Littleton was raised in this fashion:

DeLashmutt in his Motion (Answer), (R. 28a in Court of Appeals, R. 31 in this Court) at paragraphs (2) (b) and (c), alleged that (1) Mr. Littleton withdrew all objections theretofore filed by him and (2) by deed conveyed the real estate to Mr. DeLashmutt.

Mr. Littleton, in his Answer (Reply), (R. 30a in Court of Appeals, R. 33 in this Court) asserted that such withdrawal of objections and the deed were void because they were made and executed as part of a contract between him and respondent whereby in consideration of them the respondent agreed to do certain things which he never performed, but wholly disregarded his obligations thereunder.

THOSE TWO QUESTIONS, WHICH WERE NEW AND NEVER BEFORE RAISED, NEVER REACHED A HEARING IN THE DISTRICT COURT BECAUSE THAT COURT REFUSED TO HEAR THEM.

THE ONLY ISSUE THAT WAS APPEALED FROM THE DISTRICT COURT WAS CREATED BY THE REFUSAL OF THAT COURT TO AFFORD A HEARING OF THE QUESTIONS PRESENTED TO IT. THE COURT OF APPEALS REFUSED TO CONSIDER THAT ISSUE OF THE RIGHT TO BE HEARD.

Instead of meeting that issue of a *right to a hearing* the respondent contended in the Court of Appeals and he now continues to contend here, that the two questions presented had already been heard and considered in the District Court and in the Court of Appeals, and in this Court.

That contention is entirely false, as is shown at pages 23, 24 and 25 of the petitioner's brief in this Court.

In short the respondent refuses to meet the issue and parries it by raising points not in the appeal or in this proceeding seeking certiorari.

HOW RESPONDENT PARRIES THE POINT.

In respondent's brief in this Court at page 4, fifth line from the top of the page, he says: "However, the debtor was given an opportunity to file and filed on October 14, 1950, a brief in support of his application" . . . That statement is wholly false. A reading of the brief he refers to refutes his statement and shows that it argued only the right to a hearing.

That brief of October 14, 1950, is at R. 43a in the Court of Appeals, and in this Court at R. 76. In two short paragraphs at the bottom of R. 76 appear these words:

> "It" [that is, the brief] "*includes* the right of the farmer-debtor to file his application and *have it heard* and the jurisdiction of the court to hear and rule upon it.
>
> "It does not purport to present or argue the substantiative matters which are comprised in the application but *is confined solely to* the adjective subject of procedure—*the right of presentation, the right to be heard,*" . . .

The last paragraph of that brief (at Court of Appeals R. 51a, in this Court R. 84) reads:

> "The pending Application filed March 14, 1950, is properly before the Court for presentation at a hearing."

The petitioner then filed a Motion for Hearing of his Application Court of Appeals 37a, in this Court R. 40. That Motion for Hearing was denied. Court of Appeals 41a, in this Court R. 44.

Therefore it is incontestibly proved that these two questions were never given a hearing in the District Court. Instead the Application which raised them was called an application for a "*rehearing*" which it was *not*.

The Court of Appeals also called it an application for a "*rehearing*" and the respondent continues likewise to parry the issue in this Court.

We repeat that the only issue which the District Court heard was *the right to have the questions* raised by the Application, the Motion and the Answer *heard* and the court denied that right.

That issue the District Court parried by calling the Application an Application for a "*rehearing;*" the Court of Appeals called it "*rehearing;*" the respondent argues now in this Court by calling it "rehearing."

RESPONDENT'S ARGUMENT THAT A COURT HAS DISCRETION TO DENY A HEARING OR TO GRANT ONE HAS NO PLACE IN THIS CASE.

We agree fully with the argument of the respondent that the power to *rehear*, or *reexamine*, an *issue already heard* is to be exercised in the discretion of the Court.

That subject is but a scape goat on to which is loaded the specious argument which has already resulted in the violation of one of the most important conceptions of Anglo-American Jurisprudence—a litigant is entitled to his day in court when he can present his case and have it decided upon the evidence he adduces to sustain his allegations.

It is a novel suggestion that (1) what has never before been alleged or decided at any hearing has already been heard, and a *hearing* of it would be a *rehearing*, and (2)

though evidence to sustain the allegations has not been presented at a hearing, nevertheless they are not sustained.

Public confidence in the judiciary and in our judicial system is destroyed by such procedure.

RESPONDENT'S ARGUMENT OF "BREACH OF CONTRACT".

Another specious scape goat argument of the respondent is that although the respondent had taken from petitioner certain considerations under a contract which he has refused to honor, yet the petitioner may not rescind the contract for failure of consideration but must sue for damages. We do not understand that to be the law. Whether it is or not, is not before this court, was not before the Court of Appeals, and was never considered upon a hearing in the District Court.

We will repeat what was said in petitioner's brief in this Court, in the Court of Appeals and in the District Court, namely:

1. The money paid into the District Court under the purported sale should be returned to the respondent, who was the purchaser.

2. Claims that have been paid, are not involved, they remain paid.

The tragedy of this farmer-debtor case is that there were at all times ample assets to pay all claims and court costs and repeated attempts, over many years, to have them all paid were denied. This is further emphsized by the fact

that, as referred to in respondent's brief under paragraph (d) on page 11, the petitioner's $18,000 was never paid out to him by the Court. In fact, more than that sum still reposes in the registry of the District Court despite all efforts to dislodge it, after all claims and costs of every kind have been paid.

Perhaps among all the farmer-debtor cases administered under the farmer-debtor statute there have been more instances of deviation from it in this case than in any other such case. This resulted primarily because it was administered as a bankruptcy case to be controlled by the creditors, and not by the court, controlled by the mandate of the statute, as time after time directed by this Court.

Respectfully submitted,

ELMER MCCLAIN
Counsel for Joseph J. Mathy, Executor of the Estate of Frank Campbell Littleton, deceased.

Lima, Ohio
November 23, 1951.